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The assessment of damages in a Fatal Accident Case

Steve Hill Ltd v Witham (Deceased) (2021) EWCA Civ 1312

This was an appeal by the appellant/defendant in respect of a claim brought by the respondent/claimant under the Fatal Accidents Act 1976 ("FAA") and the Law Reform (Miscellaneous Provisions) Act 1934 for damages arising from the death of her husband. He died from mesothelioma on 10 January 2019 at the age of 55 caused by exposure to asbestos when working as a general labourer for the defendant in the late 1990s. At an assessment of damages hearing a Deputy High Court Judge ("the judge") assessed the claimant's damages in the gross sum of £928,827.22 inclusive of interest.

The claimant and her husband married in 2003. The claimant worked as a specialist paediatric diabetes nurse; her husband worked as a builder. They did not have biological children but from July 2015 they began a temporary fostering placement of two children, a brother ("A") and a sister ("B"). A had been diagnosed with autism spectrum disorder ("ASD") and attention deficit hyperactivity disorder ("ADHD"). B had been diagnosed with ADHD and an attachment disorder. The fostering placements were made permanent in January 2018. The claimant and the deceased were foster carers under a "Foster Plus" agreement with a local authority.

Following her husband's death, the claimant continued as the sole foster carer for the children under a new Foster Plus agreement.

IN BRIEF

The Court of Appeal upheld the findings of a Deputy High Court Judge that the dependant widow was entitled to recover the cost of replacing her deceased husband's services as carer to two foster children.

This was at full commercial rate, with no deduction of 25%.

At the damages assessment hearing the relevant FAA issues which the judge had to determine were: (a) the valuation of the claimant's dependency upon the deceased for remaining at home to provide childcare and domestic services; and (b) the valuation of the claimant's dependency upon her husband for other services.

The judge found that the claimant and her husband were extremely happy and would have stayed together to old age were it not for the onset of his illness. As a couple they discussed important life decisions and reached agreement which would then be acted upon. One such decision was to foster the children, not only to provide the dual benefit of giving them a family of their own but also to help children in foster care who had previously experienced traumatic and difficult beginnings. Although they received £50,000 from the council as a fostering allowance, the judge found that their decision to foster A and B was not a business decision nor a choice to maximise their finances but one of the decisions they made as a loving couple as to how they would like their family to be constituted.

The terms of the Foster Plus agreement required at least one parent to be available in respect of the fostering of A and B. The judge accepted the claimant's evidence that as a couple, the claimant and her husband had decided that she would return to full-time work and that he would be the parent at home responsible for most, if not all, aspects of domestic life. That was part of their long-term aim to keep A and B together, with the intention one day of adopting them. The judge found that the claimant and her husband had made the decision that one of them needed to be available at all times for A and B's needs irrespective of the express terms of the Foster Plus arrangement.

Having considered the relevant authorities and made findings of fact, the judge determined that the dependency was that of the claimant rather than A and B. The judge found that the claimant was dependent upon her husband as the principal carer for A and B, which allowed her to pursue a career for the benefit of the whole family in the knowledge that their children would be properly cared for.

Having found that it was the claimant's dependency on her husband which had been lost, the judge determined that was recoverable in law on the basis that she had a reasonable expectation of pecuniary advantage, namely the money she would have earned at work from the continuation of her husband's life who would have continued to look after their home and their children.

In valuing the claimant's dependency, the judge did not do so upon the basis of the claimant's loss of earnings and pension loss as he found it did not come within the ambit of section 3(1) FAA. The judge determined that replacement care was the appropriate measure of loss to be adopted. He considered the correct approach was to value the services which the claimant had lost as a result of her husband's death, not the valuation of the services which she was now providing. Following what he described as "that logic", he found "not simply that the commercial rate [was] the appropriate rate to apply but also there should be no 25% discount ...".

The amended grounds of appeal were:

(1) On the facts found, the award of £585,904 in respect of the deceased's "Child Care and Domestic Services" was, on a proper construction of the FAA, not open to be made as a loss proportioned to any injury suffered by the claimant herself.

(2) In the alternative the claimant's loss, in replacing the deceased's childcare services, could only be given a pecuniary value which took account of the fostering allowance and other benefits she received for doing so.

(3) It was contrary to principle to assess the value of the dependency by reference to the full commercial cost of replacing the same notwithstanding the fact that such costs would not (and could not) ever be incurred by the claimant who would also not incur any liability for income tax or national insurance contributions on such award.

(5) The award in relation to future loss of services dependency could now be seen to be erroneous in light of events which had occurred since trial, namely that A and B were no longer in the claimant's care. The defendant was permitted to adduce fresh evidence on this point.

It was agreed between the parties and the court that ground 5 should be taken before grounds 1 to 3.

Ground 5

The Court of Appeal held that the new evidence was directly relevant to the continuance of the dependency. As the children were no longer in the care of the claimant, the dependency could not be said to be continuing as the premise upon which it was based no longer existed.

The new evidence was of such a nature as to undermine the judge's original findings and the resultant valuation, which was based upon the fact that the foster care arrangements would continue until 2029. To refuse to admit the evidence "would affront common sense, or a sense of justice". Given the potential effect of the same upon the valuation of the claimant's dependency, absent agreement between the parties, the only reasonable course was to remit this matter to the trial judge to allow for a re-evaluation of the claimant's dependency in the light of the new evidence.

Ground 1

The essence of this ground of appeal was that the true loss of the deceased's services was to the foster children who did not fall within the category of dependants as set out in S1(3) FAA. It was the children who lost the benefit of the services of the deceased, not the deceased's wife. The defendant accepted that had the services been provided by the deceased to the claimant it would not be an objection to an award that such services might also have benefited third parties who were not eligible to claim as dependants.

Dismissing this ground, the Court of Appeal held that the judge's finding that the claimant had sustained a loss was premised upon other findings of fact, in particular that her husband would have been the primary carer for A and B, so as to enable her to return to work and pursue her career.

The judge's findings were not open to challenge in this appeal.

The assessment of the dependency valuation was fact specific. In approaching such an assessment, the court should identify and assess the loss which was truly suffered. The reality of the claim before the judge was that the claimant lost her career as a result of her husband's death and her loss of his services. She was dependent upon him taking the role of househusband and principal

carer for the children so that she was able to pursue a career in the knowledge that the children would be properly cared for.

Undisputed was the evidence that the claimant and her husband had a stable and long-term relationship. The decision they made to foster A and B was properly described on behalf of the claimant as having "at its core" a decision to have a family, one of the most fundamental decisions a husband and wife can make as a couple. Flowing from that decision, the manner in which they approached the issue of family commitments and their respective employment was clearly a decision between a husband and wife in respect of children and properly so found by the judge. His finding of fact on that issue is unassailable. There was nothing "incidental" to the husband/wife relationship in this decision, it was its core.

What the claimant had lost was the benefit of the service which her husband provided in caring for the children. That being so, she could legitimately claim the cost of securing those services to enable her to place herself in the position she was prior to her husband's death. The value of his service was not affected by the fact that the claimant was required to care for the children pursuant to the fostering arrangements.

Ground 2

Dismissing this ground of appeal also, the Court of Appeal held that the judge found that the decision to foster was not a business decision "or a choice to maximise their finances". He found that the foster care payment was helpful but "was not the motivation behind the decision to foster".

Prior to her husband's death, the claimant, jointly with him, had the benefit of the foster care payment plus the benefit of his services. After his death she had the benefit of the foster care payment but had lost the benefit of his services. The fact that she had sole responsibility for fostering after the death, as opposed to joint responsibility before it, was neither here nor there. The foster care payment was a constant, before and after the death. It did not affect the claimant's loss of dependency upon her husband's services.

Ground 3

This ground was also dismissed. The essence of this ground was that as the claimant was accepted to be the person who would care for A and B, the judge should have looked at the reality of the situation and should not have costed care at the commercial rate.

It was open to the judge to find the measure of loss appropriate to the facts of the case. The loss which would in fact have provided the highest level of damages would have been the claimant's loss of earnings. What was in issue in a dependency claim under the FAA was the value of the services which the deceased would have provided had he not died.

It was the value of the services lost which required assessment and compensation, not the value of how the dependant managed following the death. The decision of the judge to value care, not on the basis of the gratuitous replacement by a friend or relative, but on the basis of the estimated cost of employing labour to replace the lost service, was one open to him to make. Further, having so found, there was no identified requirement to make a 25% or other deduction.

The full case report is at: [Steve Hill Ltd v Witham \[2021\] EWCA Civ 1312 \(26 August 2021\) \(bailii.org\)](https://www.bailii.org/uk/cas/civ/2021/1312.html)

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